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# Adventist Health Services (M) Sdn Bhd & Ors v Teddric Jon Mohr

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24NCVC-217–02 OF 2013
S NANTHA BALAN JC
12 SEPTEMBER 2013

*Civil Procedure — Stay of proceedings — Special circumstances — Dismissed company executive sought to stay application compelling him to transfer share in company to successor pending conclusion of suits challenging dismissal — Whether challenges to dismissal irrelevant to order sought for in application — Whether transfer of share implied term/obligation defendant had to fulfill under company's memorandum/articles of association — Whether stay of hearing of application would render company unable to function effectively due to uncertainty over shareholding/membership*

The defendant was employed as the chief executive officer cum president ('CEO/president') of the Penang Adventist Hospital run by the second plaintiff ('P2'). The first plaintiff ('P1'), P2 and the hospital were all not-for-profit entities established by the Seventh-day Adventist Church. In accordance with P1's memorandum and articles of association ('M&AA') whoever held the position of CEO/president automatically became a director of P1 until such time he/she ceased to hold that office whereupon the incoming CEO/president would take over the directorship in P1 from the former holder of that office. The M&AA also provided that shareholders in P1 did not hold the shares for their own benefit or interest and they could only transfer their shares to the person who succeeded them in office. In accordance with those provisions, when the defendant became a director of P1 by virtue of his office, he acquired a gratuitous one share in P1 from the immediate past CEO/president. However, when P2 dismissed the defendant as CEO/president and appointed the third plaintiff ('P3') to that office, the defendant filed two civil suits to challenge the validity of his dismissal and refused to transfer his share in P1 to P3. The instant application ('the originating summons') by the plaintiffs was, inter alia, to compel the defendant to transfer his share to P3 in accordance with the M&AA as he had ceased to be an ex officio director of P1 following his dismissal as CEO/president. The defendant applied for a stay of the originating summons ('the stay') pending the determination of his suits challenging his dismissal contending that if he was successful in those suits he would be reinstated as CEO/president. The defendant also opined that he was not obligated to transfer his share in P1 to P3 but had the discretion whether or not he should do so. The plaintiffs argued that the defendant was not only obliged to transfer his share to P3 but it was an implied term in P1's M&AA that he

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should do so. They argued that if the originating summons was stayed P1 would be unable to function properly due to uncertainty over its shareholding/membership and this would affect its harmonious working relationship with P2 to carry out their charitable objectives.

**Held,** allowing the originating summons and dismissing the stay:

(1) No special circumstances were shown to warrant the exercise of the court's discretion to grant the stay. The defendant's legal challenges to his dismissal were irrelevant to the issue in the originating summons which was whether the defendant was obliged to transfer to P3 his one share in P1 consequent upon his dismissal as CEO/president of the hospital. A stay of the originating summons would have meant P1 would be unable to function properly when uncertainty remained over its membership/shareholding. It was therefore imperative that the originating summons had to be heard on its merits without delay (see paras 62, 71–73 & 87).

(2) Upon the defendant's dismissal as CEO/president of the hospital, he ceased to be a director and member of P1 by virtue of P1's M&AA. At all times, the one share the defendant held in P1 was transmitted to him by his predecessor and, like his predecessors before him, the defendant did not pay for the share. It was gratuitously transmitted to him purely on account of his position as CEO/president of the hospital and director of P1 and he was entitled to hold that share so long as he continued to be in office. That share was never his property to deal with as he pleased and, under P1's M&AA, the defendant could not transfer that share to any person other than to P3 who succeeded him in office. The defendant had no discretion in the matter and upon his dismissal he had no choice but to give up the share in P1 to P3 (see paras 75–77, 79, 81 & 83).

(3) Even if it was not expressly stated in the M&AA that the defendant did not own the share and had to transfer it to his successor when he ceased to be CEO/president of the hospital, it was not only reasonable and necessary as a matter of business efficacy but an implied term of P1's M&AA that upon the defendant's dismissal as CEO/president of the hospital, he should transfer his share to P3 who replaced him both as CEO/president and as director of P1. The implied term could also be gathered from the practice all along that the outgoing CEO/president would transfer his share in P1 to his successor (see paras 84–85).

(4) The defendant's assertions that he was entitled to exercise his rights as a member of P1 including the right to wind it up were inimical to P1's M&AA and untenable as at all times he never had any contractual, legal or equitable basis to assert any such a right as a member/shareholder of P1 (see para 87).

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Defendan telah bekerja sebagai ketua pegawai eksekutif merangkap presiden ('CEO/presiden') di Hospital Adventist Pulau Pinang yang dikendalikan oleh plaintif kedua (P2). Plaintif pertama (P1), P2 dan hospital tersebut merupakan entiti yang tidak mengaut keuntungan ditubuhkan oleh Gereja seventh-day Adventist. Menurut memorandum dan artikel persatuan P1 ('M&AA') sesiapa yang memegang jawatan sebagai CEO/presiden secara automatik menjadi pengarah P1 sehingga dia berhenti memegang jawatan itu sehingga CEO/presiden baru mengambil alih jawatan pengarah di P1 daripada pengarah terdahulu. M&AA turut memperuntukkan bahawa pemegang saham di dalam P1 tidak memegang saham untuk keuntungan atau faedah mereka sendiri dan mereka hanya boleh memindahkan saham kepada orang yang mengambil alih jawatan mereka. Menurut peruntukan tersebut, apabila defendan menjadi pengarah P1 menurut kuasa jawatannya, dia memperolehi satu saham gratis daripada CEO/pengarah yang terdahulu. Walau bagaimanapun, apabila P2 memecat defendan sebagai CEO/presiden dan melantik plaintif ketiga ('P3') sebagai pengarah, defendan memfailkan dua guaman sivil untuk mencabar keesahan pemecatannya dan menolak untuk memindahkan sahamnya di dalam P1 kepada P3. Permohonan ini ('saman pemula') oleh plaintif-plaintif adalah, antara lain, untuk memaksa defendan untuk memindahkan sahamnya kepada P3 mengikut M&AA kerana dia sudah berhenti daripada menjadi pengarah ex efficio P1 berikutan pemecatannya sebagai CEO/presiden. Defendan memohon untuk penangguhan saman pemula ('penangguhan') sementara menanti penentuan guaman-guamannya mencabar pemecatannya menghujahkan bahawa jika dia berjaya dalam guaman-guaman itu dia akan dilantik semula sebagai CEO/presiden. Defendan juga berpendapat bahawa dia tidak bertanggungjawab untuk memindahkan sahamnya di dalam P1 kepada P3 tetapi mempunyai budi bicara sama ada atau tidak dia perlu berbuat demikian. Plaintif-plaintif berhujah bahawa defendan bukan hanya bertanggungjawab untuk memindahkan sahamnya kepada P3 tetapi ia adalah terma tersirat di dalam M&AA P1 bahawa dia perlu berbuat demikian. Mereka menghujahkan bahawa jika saman pemula ditangguhkan P1 tidak akan boleh untuk berfungsi dengan betul disebabkan oleh ketidakpastian terhadap pegangan saham/keahlian dan itu akan menjejaskan perhubungan kerja yang harmoni dengan P2 untuk menjalankan objektif amal mereka.

**Diputuskan,** membenarkan saman pemula dan menolak penangguhan:

(1) Tiada keadaan-keadaan khas telah ditunjukkan untuk mewajarkan budi bicara mahkamah untuk membenarkan penangguhan. Cabaran undang-undang terhadap pemecatannya adalah tidak berkaitan kepada isu di dalam saman pemula yang mana sama ada defendan bertanggungjawab untuk memindahkan kepada P3 satu sahamnya di dalam P1 disebabkan oleh pemecatannya sebagai CEO/presiden hospital tersebut. Penangguhan saman pemula akan bermakna P1 tidak dapat

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berfungsi sepenuhnya apabila ketidakpastian kekal terhadap keahlian/pegangan sahamnya. Oleh kerana itu adalah penting saman pemula didengar pada meritnya tanpa tangguhan (lihat perenggan 62, 71–73 & 87).

(2) Atas pemecatan defendan sebagai CEO/presiden hospital, dia berhenti daripada menjadi pengarah dan ahli P1 menurut kuasa M&AA P1. Pada setiap masa, satu saham yang defendan pegang di dalam P1 dipindahkan kepadanya oleh pendahulunya dan, seperti pendahulu-pendahulu sebelumnya, defendan tidak membayar untuk saham tersebut. Ia adalah dipindahkan secara gratis kepadanya semata-mata disebabkan oleh kedudukannya sebagai CEO/presiden hospital dan pengarah P1 dan dia berhak untuk memegang saham selama mana dia memegang jawatan tersebut. Saham itu bukanlah hartanya untuk diuruskan sesuka hati dan, di bawah M&AA P1, defendan tidak boleh memindahkan saham tersebut kepada mana-mana orang selain daripada P3 yang mengambil alih jawatannya. Defendan tidak mempunyai budi bicara dalam perkara itu dan atas pemecatannya dia tidak mempunyai pilihan tetapi untuk menyerahkan saham di dalam P1 kepada P3 (lihat perenggan 75–77, 79, 81 & 83).

(3) Jika pun ia tidak dinyatakan secara nyata dalam M&AA bahawa defendan tidak memiliki saham tersebut dan perlu memindahkannya kepada penggantinya apabila dia berhenti menjadi CEO/presiden hospital, ia bukan hanya munasabah dan perlu sebagai satu perkara kecekapan pengurusan tetapi terma tersirat M&AA P1 bahawa atas pemecatan defendan sebagai CEO/presiden hospital, dia perlu memindahkan sahamnya kepada P3 yang menggantinya sebagai CEO/presiden dan pengarah P1. Terma tersirat itu boleh juga disimpulkan daripada amalan semua CEO/presiden yang keluar akan memindahkan sahamnya di dalam P1 kepada penggantinya (lihat perenggan 84–85).

(4) Dakwaan defendan bahawa dia berhak untuk menggunakan hak-haknya sebagai ahli P1 termasuk hak untuk menggulungnya adalah memudaratkan kepada M&AA P1 dan tidak dapat dipertahankan kerana pada setiap masa dia tidak pernah mempunyai apa-apa dasar kontraktual, undang-undang atau ekuiti untuk mendakwa apa-apa hak sebegitu sebagai ahli/pemegang saham P1 (lihat perenggan 87).

**Cases referred to**

*Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 2 All ER 1127; [2009] 2 BCLC 148, PC (refd)

*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, SC (refd)

*Board of Governors of Sekolah Menengah St Gabriel v Ranjit Singh* [1970] 1 MLJ 38 (refd)

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*Holmes v Lord Keyes* [1959] Ch 199, CA (refd)
*MCAT GEN Sdn Bhd v Celcom (Malaysia) Bhd (Part 2)* [2007] 8 MLJ 107, HC (refd)
*Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135, FC (refd)
*Nortel Networks (Asia) Ltd (formerly known as Northern Telecom (Asia) Ltd) & Ors v Sapura Holdings Sdn Bhd & Ors* [2012] 6 MLJ 491; [2012] 8 CLJ 296, CA (refd)
*Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, FC (refd)
*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (refd)
*Subramanyah a/l AJ Karuppiah v Bank Negara Malaysia* [2011] 3 MLJ 454; [2011] 2 CLJ 178, CA (refd)
*Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140 (refd)

**Legislation referred to**

Companies Act 1965 ss 24(2), 33(1)
Evidence Act 1950 ss 91, 92
Industrial Relations Act 1967 s 20
Rules of Court 2012 O 18 r 19(1)(b), (d)

*YC Wong (HC Lim with him) (YC Wong) for the plaintiffs.*
*Murali Ram (Allen Chee Ram) for the defendant.*

**S Nantha Balan JC:**

**[1]** These are my combined grounds of judgment in respect of two enclosures, namely; the originating summons ('the OS') (encl 1) and an application for stay of proceedings filed by the defendant (encl 4) ('the application for stay').

**[2]** The application for stay, is for an order that the OS be stayed pending the decision in related Civil Actions No 22NCVC-132–02 of 2012 ('Suit 132') and 22NCVC-01–09 of 2011 ('Suit 09') respectively, which (according to the defendant) will settle the issue of whether the defendant is the rightful chief executive officer and director of the second plaintiff and therefore, the rightful shareholder of the first plaintiff.

BACKGROUND

**[3]** The first and second plaintiffs were established by the Seventh-day Adventist Church. It is a condition in their respective memorandum and articles of association ('M&AA') that their directors and members must be members of the said church. They are not-for-profit companies.

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**[4]** The second plaintiff operates the Penang Adventist Hospital ('the hospital') which is a not-for-profit hospital also established by the said church historically. By a licence granted under s 24(2) of the Companies Act 1965 dated 5 April 2001, the second plaintiff was permitted to change its name from Adventist Hospital & Clinical Services (M) Bhd to the present name, without the 'Berhad'.

**[5]** The OS pertains to the defendant who at one time was employed by the second plaintiff and ipso facto became a director and a member of the first plaintiff. The defendant was first appointed and employed by the second plaintiff as its chief executive officer ('CEO') on 12 January 1998. The CEO of the hospital is also known as the president of the hospital.

**[6]** After he became CEO of the second plaintiff, he was made a director of the second plaintiff and became a member/shareholder of the first plaintiff. His employment was renewed and extended from time to time until 29 August 2011 when he was given a letter of dismissal.

**[7]** According to the plaintiffs, the defendant's last contract of employment would in any event have expired on 31 July 2012. He was replaced by the third plaintiff who is the current CEO/president of the Hospital. The defendant became an ex officio director of the first plaintiff by virtue of his office as the CEO/president of the hospital.

**[8]** This was in accordance with article 59 of the first plaintiff's M&AA which makes the CEO/president of the hospital its ex officio director.

**[9]** Article 59 board of directors:

> The number of the Board of Directors of the Corporation shall be seven (7) composed of the presidents of the three Missions of Seventh-day Adventists in the Federation of Malaysia; Penang Adventist Hospital; the president of South East Asia Union Mission of Seventh-day Adventists; the secretary of Adventist health Services/South East Asia, and the president of Adventist Health Services/Asia and the names are as follows: ...

**[10]** By virtue of article 60 of the first plaintiff's M&AA, once the defendant ceased to be the president/CEO of the hospital, he would cease to be a director of the first plaintiff. Hence, whoever replaces him as the CEO/president should also replace him as a director. Thus, the defendant ceased to be a director of the first plaintiff after his dismissal as the hospital's president/CEO. The third plaintiff who replaced the defendant as the CEO/president of the hospital became a director of the first plaintiff in place of the defendant.

**[11]** Article 60 reads as follows:

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> All Directors must be members of the Seventh-day Adventist Church and shall hold office by virtue of their positions aforesaid and in the event that they cease to hold the said offices they shall forthwith cease to be directors and the person replacing them as office-holder shall be a director in their stead ....

**[12]** Despite the fact that as of 29 August 2011 the defendant has ceased to be the CEO/president of the hospital, he refused to transfer to the third plaintiff (his successor) his one share in the first plaintiff, which he holds purely by reason of his position as CEO/president of the hospital. As such, the OS which was filed by the plaintiffs is for an order that the defendant do transfer to the third plaintiff, the one share in the first plaintiff presently held under his name, and other consequential orders.

**[13]** The grounds upon which the OS is predicated are; that the defendant became the shareholder of the said one share in the first plaintiff as a result of his position as a director of the first plaintiff in circumstances where the M&AA of the first plaintiff, namely article 46 thereof, stipulates that the members of the first plaintiff shall consist of, inter alia, its directors.

**[14]** Article 46 of the first plaintiff's M&AA reads as follows:

> The members of the corporation shall be:
>
> (1) ...
>
> (2) The Directors of the Corporation and ...

**[15]** Next, the plaintiffs also rely on article 26 of the first plaintiff's M&AA which provides, inter alia, that no share may be transferred by a member to any person other than to the person succeeding him in office. It reads as follows:

> Notwithstanding anything in these Articles contained, no share may be transmitted or transferred by a member to any person other than to the person succeeding him in office in the Seventh-day Adventist Church.

**[16]** The plaintiffs also say that members of the first plaintiff do not hold its shares for their own benefit and interest. In this regard, reference was made to cll 4 and 7 of the first plaintiff's M&AA, which provides that no portion of the first plaintiff's profit/income or property may be paid, transferred or distributed to its members. It is a long established practice of the first plaintiff that its outgoing directors would transfer the shares held under their respective names to the incoming directors.

**[17]** It is alleged that the defendant had full knowledge and was involved in signing some of the directors' circular resolutions approving such transfers: see

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affidavit in reply of Leong Fai dated 8 April 2013, para 4.2 and exh P19 which has not been disputed by the defendant.

**[18]** Thus, the one share held by the defendant was itself previously transferred to him by the then outgoing president of the hospital when the defendant first became the president of the hospital and by virtue of that, an ex officio director of the first plaintiff.

**[19]** He never paid the nominal consideration of RM1 for the transfer. Again, this was raised in the affidavit in reply of Leong Fai dated 8 April 2013 in para 4.1 and was also not repudiated by the defendant and therefore deemed admitted.

**[20]** The plaintiffs' contend that the defendant's position as a director of the first plaintiff was at all material times an ex officio position, that is, pursuant to his office as the president/CEO of the hospital. By virtue of his appointment to the office of the hospital's president/CEO in 1998, he automatically became a director of the first plaintiff in accordance with articles 59 and 60 of the first plaintiff's M&AA.

**[21]** The defendant was dismissed on 29 August 2011 and consequently ceased to be the president/CEO of the hospital. In any event, the plaintiffs contend that his contract of employment expired on 31 July 2012. The third plaintiff, subsequently replaced the defendant as the hospital's CEO/president.

**[22]** Hence, the defendant automatically ceased to be an ex officio director of the first plaintiff, and was replaced by the third plaintiff.

**[23]** Thus, the defendant should similarly be replaced by the third plaintiff to be a member/shareholder of the first plaintiff. At all material times, article 46 of the first plaintiff's M&AA were strictly followed, as all outgoing directors of the first plaintiff would transfer their shares to the incoming directors to make them shareholders/members.

**[24]** However, although the defendant has been replaced by the third plaintiff as the president of the hospital as well as a director of the first plaintiff, he refused to transfer the said one share held by him to the third plaintiff. Instead, through his solicitors, the defendant demanded for certain documents which he claimed to be 'substantial factor to be taken into consideration for the valuation of the one share'. He even threatened to file winding up petition against the first plaintiff.

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**[25]** The defendant contends that the OS should be stayed as he has by Suit 09 and Suit 132 challenged, inter alia, the validity of the 29 August 2011 dismissal of the defendant. The plaintiffs say that that is irrelevant to these proceedings and in any event has now become academic. According to the plaintiffs, the only issue raised in the defendant's affidavits which remain relevant is whether the defendant is obliged to transfer the one share held by him to the third plaintiff or does the defendant have a discretion whether to transfer or not to transfer?.

**[26]** In this regard, the defendant had stated in para 25 of his affidavit in reply dated 18 March 2013, that he 'may only transfer [his] share in the First Plaintiff to the person succeeding [him] in office' (as provided for in article 26 — see para 12 of Leong Fai's supporting affidavit), but claimed that 'such transfer to a successor cannot be imposed upon me, as I believe *the discretion to transfer the said share remains with me at all times*'. (Emphasis added.)

**[27]** Based on the foregoing facts, the submissions made on behalf of the plaintiffs is that:

(a) on a true construction of the M&AA of the first plaintiff, the defendant is obliged to transfer the one share to the third plaintiff who replaced him as the president of the hospital and as a director of the first plaintiff; and

(b) alternatively, it is an implied term of the M&AA of the first plaintiff that the defendant must transfer the said one share to the third plaintiff who replaced him as the CEO/president of the hospital and as a director of the first plaintiff.

**[28]** In amplification of the above, counsel for the plaintiffs submitted that by virtue of s 33(1) of the Companies Act 1965, the memorandum and articles of association of a company constitute a statutory contract between the company and its members/shareholders and also between its members and members inter se. See *Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140.

**[29]** Next, counsel referred to *Holmes v Lord Keyes* [1959] Ch 199 at p 215, where Jenkins LJ stated as follows:

> I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible in the language of the articles, in preference to a result which would or might prove unworkable.

**[30]** Counsel then referred to article 26 of the first plaintiff's M&AA which provides that 'no share may be transferred by a member to any person other

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than to the person succeeding him in office' and submitted that the defendant cannot transfer the said one share to any person other than to the third plaintiff who succeeded him in office. The only remaining question is whether the defendant is obliged or under a duty to transfer, or does he have the discretion not to transfer as alleged by him.

**[31]** In this regard, reference was made to article 46(2), which provides that the members of the first plaintiff shall be, inter alia, the directors of the first plaintiff and that the first plaintiff's members will only be its directors. In other words, directorship is what makes one eligible to be a member of the first plaintiff's company. Thus, the defendant having lost his directorship is no longer eligible to be a member of the company. The third plaintiff who replaced him as a director automatically became eligible in his stead.

**[32]** Counsel for the plaintiffs urged me to construe the articles so as to give them reasonable business efficacy and to hold that the defendant is obliged to transfer the one share to the third plaintiff. It was submitted that any other construction or interpretation will render the articles of association unworkable and chaotic. Also, it will be perverse if the defendant who is no longer eligible to be a member should have the discretion to refuse transferring the one share held under his name to the third plaintiff. It will be equally perverse if the third plaintiff who should be a member of the first plaintiff pursuant to article 46(2), can be precluded from becoming a member by the defendant by simply refusing to transfer the one share to him.

**[33]** Further, the memorandum of the first plaintiff, in particular cll 4 and 7, have made it clear that no portion of the property and income/profits of the first plaintiff shall be paid, transferred or distributed to its members — even if the first plaintiff is wound up. Thus, the first plaintiff's members do not hold any of the shares for their own benefit and interest.

**[34]** In fact, the defendant does not deny that he never even paid for the nominal consideration of RM1 for the transfer of the one share to him in 1998. Hence, he can only hold the said one share on trust or as a nominee of the first and second plaintiffs who employed him as the hospital's president thereby rendering him a director and member of the first plaintiff (refer *Holmes v Lord Keyes* [1959] Ch 199 at p 215)

**[35]** As such, it was submitted that the said one share is completely useless for the defendant after he has ceased to be a director of the first plaintiff as it will not serve any purpose for him to continue retaining the said one share. On the other hand, the first plaintiff will be crippled if the defendant who no longer has anything to do with the first plaintiff is allowed to retain the share and hold the first plaintiff at ransom. In the circumstances and in order to give business

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efficacy to the articles of association, it is only reasonable to construe that the defendant is obliged to transfer the said share to the third plaintiff consequent upon his dismissal on 29 August 2011 as the president/CEO of the hospital.

**[36]** According to counsel for the plaintiffs, the established practice of the first plaintiff whereby all outgoing directors would transfer their respective shares to the incoming directors, shows that the articles of association of the first plaintiff had been so understood and construed at all material times. Thus, counsel says that the defendant is estopped from asserting that the M&AA carry a different meaning.

**[37]** By his conduct in accepting the transfer of one share from the outgoing president and director in 1998 without even paying for the nominal consideration of RM1, and by his subsequent conduct in signing directors' circular resolutions approving transfers of shares by outgoing directors to incoming directors, he should not be permitted to say that the M&AA meant something else on its true construction. See *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324 at p 338; [2001] 1 CLJ 779 (CA) at p 796.

**[38]** Alternatively, the plaintiffs say that it is an implied term of the M&AA of the first plaintiff that the defendant must transfer the said one share to the third plaintiff who replaced him as the president of the hospital and as a director of the company. In this regard, it was submitted for the plaintiffs that a term can be implied into a company's articles of association if the business efficacy test and the officious bystander test are satisfied. See *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 2 All ER 1127; [2009] 2 BCLC 148 (PC). See also *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 (FC).

**[39]** Counsel rounded off by saying that on a true construction of the M&AA and alternatively as an implied term of the M&AA of the first plaintiff, the defendant is under a duty and an obligation to transfer the one share held by him to the third plaintiff who replaced him as the president of the hospital and as a director of the first plaintiff.

THE DEFENDANT'S SUBMISSION

**[40]** The defendant did not recognise his dismissal on 29 August 2011 as the president/CEO of the hospital and maintained that he is still the rightful CEO and director of the second plaintiff and by extension, a lawful member of the first plaintiff. The defendant referred to article 61 of the articles of the second plaintiff; and article 22 of the M&AA of the first plaintiff respectively which

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provide that the office of director or trustee (as the case may be) shall be vacated if the director or trustee is removed by a resolution of the corporation in general meeting.

**[41]** The defendant also maintains that the by-laws and operating policy (effective May 2006) of the hospital state in s 4(c)(1) that any person appointed president, vice-president for medical administration and chief financial officer may be removed at any time by a two-thirds vote of the board of directors. The defendant therefore maintains that no such decision to remove him by way of a two-thirds vote of the board of directors was ever made. In so far as the defendant's dismissal is concerned, the defendant says that the plaintiffs' reliance on a letter of dismissal dated 29 August 2011 is untenable as the legality and effect of the letter of dismissal and the defendant's purported removal from office has been challenged and is the subject of two pending civil suits via Suit 09 and Suit 132.

**[42]** Counsel then traced the genesis of the defendant's dismissal and referred to an earlier board of directors meeting of the second plaintiff held on 21 July 2011, where there was a motion to terminate the defendant's service with immediate effect and the board members voted on the issue and upon counting the votes, the motion failed to secure the required votes and the said motion was not carried.

**[43]** Subsequently, there was an attempt to nullify the meeting of 21 July 2011 by way of another board meeting on 4 September 2011 which the defendant maintains was illegally or insufficiently constituted, and therefore of no legal effect. Counsel for the defendant also made the point that the legality and effectiveness of the 4 September 2011 board meeting has been challenged in the Suit 132 where one Dr Alfred Charles Poey and the defendant herein are plaintiffs, and the sole defendant is the second plaintiff herein.

**[44]** The reliefs sought in Suit 132 are:

(a) a declaration that the notice for the extraordinary general meeting of the second plaintiff dated 20 February 2012 is null and void;

(b) a declaration that all and/or any resolution and/or decision made by the second plaintiff from 3 September 2011 until the date of judgment is null and void;

(c) a declaration that the status quo of the second plaintiff's membership and membership of its board of directors as decided by the extraordinary general meeting on 21 July 2011 is maintained and adjudged as valid; and

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(d) a prohibitory injunction to restrain and/or bar the second plaintiff, its directors/trustees and/or its agents from doing and/or causing any action to remove the defendant as a director/trustee in the board of directors of the second plaintiff until the Civil Suit No 22NCVC-132–02 of 2012 is disposed of and/or any further order of this court.

**[45]** It was submitted for the defendant that the matter is due to be set for trial by the end of 2013 and if the defendant succeeds in the Suit 132, especially with respect to prayers (b) and (c) of the writ, he would be declared the rightful chief executive officer of the hospital and a rightful director of the second plaintiff, and by extension the rightful shareholder in the first plaintiff. As such, counsel says that if this court decides Suit 132 in the defendant's favour, then it would defeat the entire purpose of the reliefs sought by the plaintiffs in the OS filed herein.

**[46]** In the circumstances, counsel for the defendant said that a stay of the OS pending the outcome of Suit 132 is the most logical course. Alternatively, counsel suggested that a consolidation of the two actions would be appropriate. Next, counsel for the defendant touched on Suit 09 wherein the plaintiffs are Dr Alfred Charles Poey and the defendant herein and the defendants are four office bearers of the first plaintiff herein and two other connected persons.

**[47]** In Suit 09, the following orders were sought:

(a) an injunction restraining the defendants from entering, operating and managing the PAH which is managed by Adventist Hospital & Clinic Services (M) in any way whatsoever, to include the holding of any meetings of its board of directors until the conclusion of this action;

(b) an order, consistent with the said injunction, that the plaintiffs are allowed to continue operating the PAH, and that the signatories of the PAH cheques under the account Adventist Hospital & Clinic Services (M) continue as the authorised signatories; and

(c) a declaration that the first and second plaintiffs (therein) are the chief executive officer/president and chief operating officer/person in charge of the PAH respectively.

**[48]** However, Suit 09 was struck off by the High Court pursuant to O 18 r 19(1)(b) and (d) on 2 July 2013 and the defendant has appealed against that decision. It was suggested that if this court hears and decides the prayers sought in the OS before the outcome of the trials set down in Suit 132 and/or the appeal from Suit 09 respectively, there may arise a conflict of decisions where

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the crux of the matter is the issue of whether the defendant remains the rightful CEO/president of the hospital, and whether he remains the rightful member of the first plaintiff.

**[49]** In any case, by way of comparison, the defendant contends that his then fellow Directors Kurus at Nelver Sikul and Nelson G Bendah had served as directors until they resigned sometime after 21 July 2011 although their respective term as president ceased in 2005 and 2010 respectively. Despite their ceasing to be president, they continued to serve and were accepted at board meetings as full voting members. This supports the defendant's position that the president of the hospital is only removed from the board when the board decides so by way of two-thirds vote in favour of a removal, if not by way of resignation.

**[50]** While the defendant accepts that he may only transfer his share in the first plaintiff to the person succeeding him in office, his position is that there has been no such legal succession, and that he is still the rightful president/CEO of the hospital.

**[51]** The defendant says that the plaintiffs, in bringing this claim so close to the determination of the two civil suits, are attempting to, in effect, nullify any decision in the defendant's favour made in either of the two civil suits mentioned above. It would be prejudicial to the defendant's interests should this matter be heard and decided before the outcome of the two civil suits filed earlier.

**[52]** The defendant also argues that no director/trustee can be appointed to the board of the first plaintiff without the prior approval of the Kementerian Perdagangan Dalam Negeri dan Kepenggunaan (Ministry of Domestic Trade and Consumer Affairs), and that therefore the appointment of Joshua Mok as trustee can only be taken as valid upon obtaining the approval from the Minister. Despite the above, Joshua Mok attended and even chaired the board meeting on 4 September 2011.

**[53]** According to the defendant, the meeting of the first plaintiff's board of trustees held on 21 July 2011 was legal, binding and remains the legitimate resolution concerning the defendant's status. The decision made in this meeting was purportedly annulled in a subsequent meeting held on 4 September 2011, which the defendant argues is at its inception illegal and void having been constituted to include Joshua Mok (who chaired the meeting) despite not having received approval from the Ministry of Domestic Trade and Consumer Affairs to act as a trustee. These matters are best resolved upon the court rendering its decision upon the trial set down in Suit 132.

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**[54]** Counsel for the plaintiffs submitted that the application for stay is merely predicated on the contention that the defendant is challenging the validity of his 29 August 2011 dismissal as the hospital's CEO/president in the said suits wherein the defendant contends that if he succeeds in nullifying his 29 August 2011 dismissal, then he would be reinstated as the president/CEO of the hospital, and consequently, he will be declared a rightful director and shareholder of the first plaintiff. He therefore contends that the outcome of the said suits will have a direct bearing on these proceedings, and thus, these proceedings ought to be stayed pending the disposal of the said suits.

**[55]** In response, counsel for the plaintiffs says that the application for stay is a non-starter and is devoid of merit. He said that the stay application is premised on the assumption that the defendant's challenge against the validity of his 29 August 2011 dismissal in the said suits, if successful, may result in his reinstatement as the CEO/president of the hospital. However, the fact remains that the defendant's contract of employment (as CEO/president) would in any event expire by 31 July 2012, even if he was not dismissed earlier: see affidavit in reply of Leong Fai dated 8 April 2013, paras 3.4 and 3.6 and exh P16. Hence, his challenge against the 29 August 2011 dismissal will not result in his reinstatement in any event.

**[56]** Also, counsel says that the defendant's attempts to rely on the alleged verbal promises to extend his contract of employment beyond 31 July 2013 are self-contradictory and inconsistent with contemporary documents (and therefore ought to be ignored entirely), and more importantly inadmissible pursuant to ss 91 and 92 of the Evidence Act 1950. Counsel then pointed out the following facts as part of effort to show that the defendant's allegation of a promise of an extended contract is inherently improbable and ought to be rejected. He said:

(a) the defendant first claimed that his appointment as CEO/president was initially from year to year because of the need to apply for work permit, and subsequently his employment was meant to be continuous after he became a permanent resident of Malaysia: affidavit in reply of Teddric Jon Mohr dated 18 March 2013, para 3;

(b) according to the plaintiffs, the defendant's allegation is false since the undisputed contemporary documents, ie his contracts of employment, show that his initial appointment was never from year to year, and that his employment was always a fixed term employment at all material times and never meant to be continuous: see affidavit in reply of Leong Fai dated 8 April 2013, paras 3.3 and 3.4 and exhs P15 and P16;

(c) then, the defendant changed his story and claimed that when his contract of employment dated 29 November 2010 (expired on 31 July 2012) was signed, one of the directors, Jan Bekker, told him to expect to

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stay on for a longer period of time, and that he decided to sign the contract on the understanding that he would be asked to stay longer until such time when there was a need and a transition for a new CEO: second affidavit in reply of Teddric Jon Mohr dated 26 April 2013, para 3;

(d) this second allegations are contrary to his initial allegations set out in sub-para (a) above, and also inconsistent with undisputed contemporary documents, ie letter dated 22 November 2010 from the church organisation (the organisation behind the first and second plaintiffs ie the defendant's employers) which made it clear to him that his next contract of employment (for 18 months or so) would be the last one, and more importantly his contract of employment dated 29 November 2010 itself, which clearly stated that it would expire on 31 July 2013: see affidavit in reply of Leong Fai dated 8 April 2013, para 3.4 and exh P16; affidavit in reply (2A) of Jan Bekker dated 16 May 2013, para 3 and exh JB1; affidavit in reply (2) of Leong Fai dated 21 May 2013, para 3;

(e) then again/the defendant further changed his story and alleged that he was 'in fact verbally offered a 3 year contract ending on 31/1/2014', which he 'had accepted': third affidavit in reply of Teddric Jon Mohr dated 26 April 2013, para 3;

(f) it is clear that his third allegations were in contradiction with his first and second, all being sworn allegations, apart from being inconsistent with the aforesaid undisputed contemporary documents. Such allegations ought to be ignored entirely: see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC) at p 408; and

(g) further, such allegations of an oral promise which contradicted the terms of an agreement in writing are inadmissible by virtue of ss 91 and 92 of the Evidence Act 1950: see the Court of Appeal's decision in *Nortel Networks (Asia) Ltd (formerly known as Northern Telecom (Asia) Ltd) & Ors v Sapura Holdings Sdn Bhd & Ors* [2012] 6 MLJ 491; [2012] 8 CLJ 296. Whatever alleged oral promises have now been superseded by a written contract of employment and cannot be relied upon to contradict the terms of the written contract.

**[57]** Therefore, the defendant's tenure as the hospital's CEO/president, if not terminated earlier, would stand expired on 31 July 2012 in any event. His challenge against the validity of his 29 August 2011 dismissal in the said suits will not change his fate at the end of the day and will not have him reinstated into office. Hence, the outcomes of the said suits are completely irrelevant to these proceedings.

**[58]** Further, Suit 09 in which the defendant directly challenged his 29

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August 2011 dismissal has since been struck off by the High Court under O 18 r 19(1)(b) and (d) of the Rules of Court 2012: see further affidavit of Dr Toh See Wei dated 9 July 2013, para 2. That leaves us with Penang High Court Suit No 22NCvC-132–02 of 2012, in which there is no direct challenge against the defendant's 29 August 2011 dismissal.

**[59]** Moreover, the validity of the dismissal of the defendant as the hospital's CEO/president by his employer cannot be questioned since he did not lodge a claim under s 20 of the Industrial Relations Act 1967 and in this regard, counsel referred to:

(a) *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135 (FC) at p 366(MLJ); pp 142 para g to 143 para b (CLJ); and

(b) *Subramanyah a/l AJ Karuppiah v Bank Negara Malaysia* [2011] 3 MLJ 454; [2011] 2 CLJ 178 (CA) at pp 466–467(MLJ); pp 192–193 paras 36–39 (CLJ).

**[60]** Counsel for the plaintiffs also said that the defendant cannot rely on his suits in the High Court to challenge his 29 August 2011 dismissal and it follows from the above that the defendant's application for stay of these proceedings pending the outcome of his challenges against the validity of his 29 August 2011 dismissal in the said suits is a non-starter and totally devoid of merit. Counsel submitted that the law relating to the granting or refusing of a stay of proceedings is well settled (see *Board of Governors of Sekolah Menengah St Gabriel v Ranjit Singh* [1970] 1 MLJ 38; *MCAT GEN Sdn Bhd v Celcom (Malaysia) Bhd (Part 2)* [2007] 8 MLJ 107).

**[61]** He said, a stay of proceedings in the circumstances of the case will prejudice the plaintiffs in that the first plaintiff will not be able to function properly and cannot properly hold an AGM or EGM when the list of its shareholders/members remains uncertain. On the other hand there will not be any injustice to the defendant if this OS is to proceed based on its merits, where both parties wiil have a fair chance to be heard fully before a decision is made.

RULING ON STAY OF PROCEEDINGS

**[62]** At the conclusion of the hearing in this matter, I decided that there were no special circumstances shown as may warrant the exercise of the court's discretion to grant a stay of proceedings pending the outcome of two separate suits namely, Suit 09 which had been struck off by the High Court under O 18 r 19(1)(b) and (d) of the Rules of Court 2012 and which is pending an appeal to the Court of Appeal and Suit 132 which has been set down for hearing.

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Nothing more needs to be said about Suit 09, except that that is the suit in which there is a direct challenge by the defendant to his dismissal as CEO/president of the hospital.

**[63]** As for Suit 132, it appears that the applications for orders of injunction and the said application were dismissed. If there were orders of injunction in place, then perhaps it may be said that it may be incongruous or contradictory for this court to allow the prayers sought in the OS.

**[64]** Hence, in the absence of any injunctive orders in Suit 132, it would appear that by granting a stay of the OS, this court would be tacitly making an interlocutory order for the benefit of the parties who are plaintiffs in Suit 132, when it appears even that court had declined to grant any interlocutory relief in that action so as to maintain the status quo vis-a-vis the defendant's position as CEO/president of the hospital and as director (and by extension as member) of the first plaintiff.

**[65]** Thus, to my mind it would be improper for me to grant a stay of the OS which are collateral proceedings when the parties had failed to obtain the appropriate orders under Suit 132 to protect and preserve the defendant's position.

**[66]** The strongest point that was made by counsel for the defendant is that a stay is necessary so that there is no conflict of decisions, particularly if the defendant succeeds in Suit 132 or if Suit 09 is resurrected by the Court of Appeal. Of course, all of these are possibilities but at the same time they present too many permutations.

**[67]** Needless to say, I do not have the crystal ball on the future nor of the possible or probable outcome of Suit 132 or of the appeal against the striking out of Suit 09. But I would say that if and when the defendant succeeds in Suit 132, then that court would have to be apprised of the orders made in the OS and if necessary, make/modify the appropriate orders or mould the reliefs to reflect the change of the status quo vis-a-vis the defendant's position as CEO/president of the hospital, directorship in the first and second plaintiffs and by extension, his position as a member of the first plaintiff.

**[68]** Whether that would necessitate a consequential order in Suit 132 to unscramble the changes to the first and second plaintiff as will occur by an order by this court under the OS, remains to be seen. But in all fairness to the defendant, I am compelled to state that nothing that I have said in this judgment is or should be seen as a pronouncement of the merits of the

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defendant's attempt to directly challenge his dismissal as CEO/president of the hospital in Suit 09 (if resurrected on appeal to the Court of Appeal) or indirectly via Suit 132.

**[69]** So issues such as the defendant's expectation or the alleged representation made that his contract would expire on 31 January 2014 or the validity (or otherwise) of the second plaintiff's board meeting on 4 September 2011 are all live issues that ought properly to be ventilated at the appropriate forum, that is, the trial of Suit 132 or Suit 09 (if resurrected on appeal).

**[70]** For now, the status of the members/shareholders of the first plaintiff cannot be left in limbo or in suspended animation, especially since the third plaintiff has been appointed to replace the defendant as the CEO/president of the hospital and a director of the first plaintiff. Hence, because of the defendant's refusal to transfer the one share held by the defendant, the third plaintiff is in the invidious position of being everything else except a member of the first plaintiff.

**[71]** To my mind, the circumstances are such that they do not favour a stay of the OS. On the other hand, with the appointment of the third plaintiff as the defendant's replacement as CEO/president of the hospital, the circumstances have become extenuating and compelling to refuse a stay of the OS and for it to be considered on merits on an urgent basis as the shareholding of the first plaintiff must be expeditiously and decisively determined so that the uncertainty over the membership is removed and for the first plaintiff to work in tandem with and in harmony with the second plaintiff and for both to function effectively as corporate entities so as to achieve their underlying charitable objectives.

**[72]** I am in agreement with counsel for the plaintiffs, who said that a stay of the OS will mean that the first plaintiff will not be able to function properly and cannot properly hold an AGM or EGM when the list of its shareholders/members remains uncertain.

**[73]** In the circumstances and for the reasons as alluded to above, I took the view that it was imperative that the OS be heard on merits without delay and accordingly dismissed the application for stay (encl 4) and ordered the defendant to pay costs of RM2,000 to the plaintiffs.

RULING ON THE OS

**[74]** As for the OS, I ruled in favour of the plaintiffs and allowed several of the prayers sought therein with costs of RM8,000 to be paid by the defendant to the plaintiff. My reasons are as follows.

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**[75]** I am of the view that upon the dismissal of the defendant as CEO/president of the hospital on 29 August 2011, he ceased to be a director of the first plaintiff by virtue of article 60 of the first plaintiff's M&AA and whoever replaces him as the CEO/president should also replace him as a director.

**[76]** Thus, the defendant having ceased as a director of the first plaintiff after his dismissal as the hospital's president/CEO became disentitled to be a member of the first plaintiff. At all material times the one share that the defendant held in the first plaintiff was transmitted to him by his predecessor and he, like his predecessors before him, did not pay for the said share. It was a gratuitous share that was transmitted to the defendant purely because of his position as CEO/president of the hospital and director of the first plaintiff.

**[77]** The said one share which the defendant held in the first plaintiff was never his property for him to deal with as he pleases. It was a transient ownership of a share which was contingent upon him holding the position of director of the first plaintiff which came about as a result of his position as CEO/president of the hospital, which upon his dismissal evaporated and disentitled him to his directorship in the first plaintiff and by extension his status a member of the first plaintiff.

**[78]** In the circumstances, the third plaintiff who replaced the defendant as the CEO/president of the hospital became a director of the first plaintiff in place of the defendant, is the successor of the defendant and is entitled to the one share in the first plaintiff held by the defendant.

**[79]** I am also of the view that the effect of article 26 of the first plaintiff's M&AA which provides that 'no share may be transferred by a member to any person other than to the person succeeding him in office' is that the defendant cannot transfer the said one share to any person other than to the third plaintiff who succeeded him in office.

**[80]** Apart from article 26, it is also relevant to have regard to article 46(2) of the first plaintiff's M&AA, which provides that the members of the first plaintiff shall be, inter alia, the directors of the first plaintiff and that the first plaintiff's members will only be its directors. In other words, directorship is what makes one eligible to be a member of the first plaintiff. Thus, the defendant having lost his directorship is no longer eligible to be a member of the first plaintiff. It follows therefore, that the third plaintiff who replaced the defendant as a director, automatically became eligible in his stead.

**[81]** In view of my finding as above as regards the defendant's obligation to transfer the one share in the first plaintiff upon his dismissal as the

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CEO/president of the hospital, it is unnecessary to deal with the question as to whether the defendant has a discretion not to transfer the said one share, as alleged by him in his affidavit. But for completeness, I will say that the defendant has no discretion in the matter and upon his dismissal as CEO/president of the hospital, he has no choice but to give up the said one share in the first plaintiff, by way of a transfer to his successor, that is, the third plaintiff. Thus, if the defendant is to have a discretion in the matter, then that must clearly be spelt out in the M&AA or other contractual document, but there is none whatsoever that was placed before this court.

**[82]** Also, the assertion by the defendant that he has a discretion whether or not to transfer the said one share to his successor, the third plaintiff clearly flies in the face of article 26 of the first plaintiff's M&AA and the other relevant articles of the M&AA. The defendant's assertion that he had a discretion in the matter simply does not sit well with the first plaintiff's M&AA as a whole and is in fact contradictory to the M&AA quite apart from being in defiance of logic.

**[83]** In my view, the relevant articles in the M&AA of the first plaintiff alluded to above, make it quite clear that the defendant did not own the said one share for his own benefit and he was merely the holder of the said share for so long as he was a director of the first plaintiff, which is a position derived from his status as CEO/president of the hospital and that he had to give up the one share to his successor once the status as CEO/president of the hospital ceased.

**[84]** However, even if it is not expressly stated in the M&AA that the defendant did not own the share and had to transfer the one share to his successor upon the cessation of his status as CEO/president of the hospital, it is my view that it would be reasonable and necessary as a matter of business efficacy, that it is an implied term of the M&AA of the first plaintiff, that upon the defendant's dismissal as the CEO/president of the hospital, the defendant is to transfer the said one share to the third plaintiff who replaced him as the CEO/president of the hospital and as a director of the first plaintiff.

**[85]** This implied term may also be gathered from the undisputed fact that the practice ail along has been that the outgoing CEO/president of the hospital will automatically transfer the one share in the first plaintiff to his successor.

**[86]** Indeed, this is how the defendant himself attained the said one share in the first plaintiff when he came on board as CEO/president of the hospital. Hence, it should be no different when the defendant ceased to be the CEO/president of the hospital.

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**[87]** The defendant's legal challenges to his dismissal and other matters such as the validity of the board meeting of 4 September 2011 of the second plaintiff via Suit 09 and Suit 132, are all irrelevant to the issue that arises under the OS, which is whether the defendant is obliged to transfer to the third plaintiff, his one share in the first plaintiff consequent upon his dismissal as CEO/president of the hospital. The answer to that question, divorced from the said legal challenges in Suit 09 and Suit 132 is unequivocally and unambiguously in the affirmative. In my view, the defendant's various posturing and stands that he is entitled to exercise his rights as a member of the first plaintiff including a right to wind up the first plaintiff are inimical to the M&AA of the first plaintiff and is completely untenable as the defendant had at all times absolutely no contractual or legal or equitable basis for asserting any such right as a member/shareholder of the first plaintiff.

**[88]** Thus, to conclude, on a true construction of the M&AA of the first plaintiff as a whole, I am of the view that upon his dismissal as CEO/president of the hospital, the defendant is obliged to transfer the one share to the third plaintiff who replaced him as the CEO/president of the hospital and as a director of the first plaintiff.

**[89]** The plaintiffs are therefore entitled to the reliefs sought in the OS. I therefore allowed prayers (1), (2), (3), (4) and (5) of the OS (encl 1) and further ordered the defendant to pay costs of RM8,000 to the plaintiffs. Prayers (6) and (7) of the OS were not allowed. Thus, the total costs that the defendant will pay for encls 1 and 4 is RM10,000.

*Originating summons allowed and stay dismissed.*

Reported by Ashok Kumar